

ESA/C(2002)3  
Att.: ESA/C/CLV/Res. 4 (Final)  
Paris, 11 January 2002  
(Original: English)

**EUROPEAN SPACE AGENCY**

**COUNCIL**

**Information document**

**Resolution on the Rules concerning Information, Data and  
Intellectual Property**

Delegations will find attached the final Resolution on the Rules concerning Information, Data and Intellectual Property adopted on 19 December 2001 during the 155<sup>th</sup> Council meeting.

**Resolution on Information, Data**  
**and Intellectual Property**

(Adopted on 19 December 2001)

The Council,

CONSIDERING that the Agency's activities and programmes create substantial scientific and technical information,

CONSIDERING that such substantial scientific and technical information supports the competitiveness objective of the Agency,

RECALLING the adoption by the Council meeting on 20-21 March 1990 of the Rules concerning Information and Data, and the decision of Council to review the Rules after a given period of time,

RECALLING the decision of the AFC during its 185<sup>th</sup> meeting to establish an ad hoc Working Group composed by national Experts on Intellectual Property in order to assess the results of the implementation of the existing Rules, analyse and take into account changes occurred in the way to carry out space activities as well as in the international Intellectual Property environment,

RECALLING the comprehensive work of the Working Group on Intellectual Property,

RECALLING the recommendation of the AFC during its 196<sup>th</sup> meeting,

HAVING REGARD to the provisions of Article III and Article XI.5.j.of the ESA Convention,

ADOPTS the following Rules concerning Information, Data and Intellectual Property (ESA/C/CLV/Rules 1 (Final)),

INVITES the Director General to prepare and submit to Council for approval the adapted provisions necessary to implement these Rules such as Staff Rules, General Clauses and Conditions of Contracts, the rules for the establishment of a Technology Transfer Board and the provisions for the protection of information by end 2002.

INVITES the Director General to monitor the impact which the application of the adopted Rules concerning Information, Data and Intellectual Property have upon European space activities and to submit to Council, after an application period of three years, a report together with eventual revision of the present Rules, if appropriate.

**Rules on Information, Data**  
**and Intellectual Property**

**General Principles**

These Rules are designed to promote access to Information and Data and use of Intellectual Property resulting from Agency activities, while fully taking into account the provisions of the Convention and the interests of the Member States and of Persons and Bodies under their Jurisdiction. The protection of Information and Data by Intellectual Property and its licensing are internationally recognised as the most appropriate and effective means of ensuring that its value is preserved and that it is effectively exploited.

The Agency considers that the originators of Information, Data and Intellectual Property are best placed to exploit it. It is therefore provided that Information, Data and Intellectual Property developed by Agency staff in the course of their duties is owned by the Agency and that Information, Data and Intellectual Property originated by a Contractor to the Agency is owned by the Contractor.

These Rules define circumstances in which there are to be rights of access, use and disclosure of Information, Data and Intellectual Property free of charge (without prejudice to reimbursement of any costs necessarily incurred by a contractor) or in exchange for a reduced charge, reflecting the financial contributions made by the Agency and its Member States towards its creation.

As a specific exception to the above-mentioned general rule, in certain cases, given the special nature of the Agency's activities, the Council may decide that the ownership of Information, Data and Intellectual Property may remain with the Agency. In these cases access and use shall be available free of charge to Member States and Persons and Bodies under their Jurisdiction, without limitation to space applications. It is thus maintained by the Agency as a pool of knowledge and experience, as an appropriate and effective means by which the Agency can support the worldwide competitiveness of the European industry.

Where the interests of the Agency are best served by making specific Information, Data and Intellectual Property available freely to the worldwide community, Council may decide to adopt the appropriate policy accordingly.

Particular account is taken of the Agency's obligations under the Convention to:

- improve the worldwide competitiveness of European industry pursuant to Article VII.1b;
- ensure that scientific results are published or otherwise made widely available pursuant to Article III.2;
- secure appropriate rights to Information and Data for the protection of its

interests, those of its Member States and those of Persons and Bodies under their Jurisdiction, including rights of access, of disclosure and of use, pursuant to Article III.3;

- disclose Information, Data and Intellectual Property that are the property of the Agency to the Member States, who (including Persons and Bodies under their Jurisdiction) may use them for their own purposes free of charge pursuant to Article III.4.

The distinction drawn by the Convention between the property of the Agency and other Information, Data and Intellectual Property is considered to be of central importance and is understood as specifically providing for access, disclosure and use which are not free of charge, wherever it is appropriate for charges to be implemented.

It is noted that, for the implementation of the present rules, ESA Financial Regulations provide the keeping of all patents and other Intellectual Property rights which belong to ESA in totality or in part.

Access to Information, Data and use of Intellectual Property by non- Member States who have entered into a co-operation agreement with the Agency shall be the same as those described in the present document, unless the said co-operation agreement provides otherwise.

## **Outline**

Chapter I concerns Information, Data and Intellectual Property created by Staff Members, Fellows and Experts of the Agency. These Rules present the basic policy of the Agency in this matter and indicate how Member States can have access to this Information, Data and Intellectual Property.

Chapter II deals with Contractor-developed Information, Data and Intellectual Property with respect to activities that are fully paid by the Agency, those that are not Fully-Paid by the Agency and partnership activities. These Rules shall each be separately implemented in a specific section of the General Clauses and Conditions for ESA Contracts.

Chapter III deals with Information, Data and Intellectual Property relating to payloads flown on space vehicles on which the Agency provides flight opportunities, including but not limited to the science programme, remote sensing activities and international space station utilisation.

The procedure for and conditions of transfer of Information, Data, Intellectual Property and assets by both the Agency and its Contractors outside the territories of Member States are dealt with in Chapter IV. These provisions, based on Article XI.5(j) of the Convention, are not intended to replace or add a new system of control to the national controls.

In Chapter V, finally, the basis is created for developing a comprehensive system for

the protection of Information, Data and Intellectual Property held by the Agency.

These Rules thus give the fullest possible guidelines for when the Agency has to deal with matters involving ownership, access, use and dissemination of Information, Data and Intellectual Property.

For the purposes of these Rules, the provisions herein shall be identically applicable to the Agency's Contractors and all sub-Contractors involved in the relevant Agency activity.

The present Rules supersede the Rules concerning Information and Data approved by Council (ESA/C(89)95, rev. 1), which themselves had superseded those of ESRO/76, (ESA/C(77)47).

## **CHAPTER I**

### **IN-HOUSE DEVELOPED INFORMATION, DATA AND INTELLECTUAL PROPERTY**

#### **1. GENERAL PRINCIPLES**

- (a) The ownership of, and right to access, Information and Data and use Intellectual Property produced by a Staff Member or Fellow or Expert of the Agency within the scope of his duty shall, as far as such use or right can be transferred, belong to the Agency. Information, Data and Intellectual Property developed by a Staff Member in the frame of an arrangement concluded by the Agency shall be governed by the terms of that arrangement.

The ownership of, and right to access, Information and Data and use Intellectual Property developed by a Staff Member, Fellow or Expert of the Agency outside the scope of his duty shall, as far as the Agency's technical and administrative facilities have not been used, belong to the Staff Member, Fellow or Expert.

- (b) In the case of Information, Data and Intellectual Property developed by a Staff Member, the Director General may, under the terms laid down in the Staff Regulations, Rules and Instructions make an award to the Staff Member or authorise him, if so requested, to exploit the rights arising from his work concurrently with the Agency, or waive those rights in favour of the Staff Member, provided that this does not prejudice the rights of Member States.
- (c) In the case of works or products protected by copyright the Director General may assign or transfer the copyright in favour of the Staff Member. However, the Agency shall retain free of charge the right to use the works or products for its own purposes.
- (d) Detailed provisions regarding Information, Data and Intellectual Property developed by a Staff Member shall be set out in the Staff Regulations pursuant to the issue of an Instruction of the Director General.

#### **2. RIGHTS OF MEMBER STATES WITH RESPECT TO INFORMATION, DATA AND INTELLECTUAL PROPERTY OWNED BY THE AGENCY**

Information, Data and Intellectual Property which is owned by the Agency may be accessed and used by Member States free of charge for their own purposes. The Agency shall grant non-exclusive royalty-free licences to Member States, with the right to sub-licence, for space research and development.

However, if the Member State concerned declares that the intended access and use of the Information, Data and Intellectual Property rights, or the reproduction thereof, is not for purposes of space research and technology or

their space applications, the Agency may request the payment of a royalty. In addition, the Agency shall be reimbursed for any expenses associated with the transfer. At the request of the Agency the recipient shall take the necessary measures to keep the information confidential for as long as and to the extent that it does not come into the public domain.

3. PUBLICATION OF INFORMATION AND DATA BY STAFF MEMBERS  
OR FELLOWS OF THE AGENCY

It is the aim of the Agency to communicate the results of scientific research and experiments conducted by its personnel. Staff Members or Fellows of the Agency, or other Experts engaged in work carried out by or for the Agency, shall inform the Director General of the results of their scientific research or experiments and of their intent to publish them. Prior permission of the Director General shall be requested in the event that such publications are related to activities of the Agency which have not previously been published. The detailed procedure to be followed shall be contained in an appropriate Instruction of the Director General.



## **CHAPTER II**

### **CONTRACTOR-DEVELOPED INFORMATION, DATA AND INTELLECTUAL PROPERTY**

Chapter II deals with Contractor-developed Information, Data and Intellectual Property, for activities that are fully-paid by the Agency (Section II), those that are not Fully-Paid by the Agency (Section III) and partnership activities (Section IV).

Section I lays down the principles that are common both to activities that are fully-paid by the Agency (Section II) and to those that are not (Sections III and IV).

The detailed provisions for the implementation of the policy laid down in the present Chapter shall be contained in the General Clauses and Conditions for ESA Contracts separately taking into account activities that are fully-paid by the Agency, activities that are not Fully-Paid by the Agency and partnerships.

#### **SECTION I**

##### **GENERAL PRINCIPLES REGARDING OWNERSHIP, ACCESS AND EXPLOITATION OF INFORMATION, DATA AND INTELLECTUAL PROPERTY DEVELOPED UNDER AN AGENCY CONTRACT**

Ownership of Information, Data and Intellectual Property developed under an Agency contract shall remain with the Contractor who has developed them. Notwithstanding these rights, the Agency shall reserve rights of access to Information and Data and use of Intellectual Property, in accordance with the provisions set out hereafter, to the extent that such access and use is necessary in the interests of the Agency and its Member States.

#### **SECTION II**

##### **ACTIVITIES FULLY-PAID BY THE AGENCY**

###### **1. ACCESS TO INFORMATION, DATA AND USE OF INTELLECTUAL PROPERTY**

###### **a. Access and use to be reserved by the Agency**

Information, Data and Intellectual Property resulting from work performed under an Agency contract shall be available to the Agency and Participating States, including Persons and Bodies under their Jurisdiction, free of charge, for the Agency's Own Requirements in the field of space research and technology and their space applications.

- b. Access and use to be reserved by the Agency on behalf of Participating States

Information, Data and Intellectual Property resulting from work performed under an Agency contract shall be available to the Participating States, including Persons and Bodies under their Jurisdiction, under Favourable Conditions, for the Participating States' own public requirements in the field of space research and technology and their space applications.

In case an issue arises over the interpretation of "Favourable Conditions" the Parties may seek a reasoned opinion from the Agency and/or another appropriate forum.

- c. Access and use to be reserved by Agency for purposes other than those defined under Section II.1(a) and (b)

Except as provided under Section II.1(a) and (b), access to Information, Data and use of Intellectual Property resulting from work performed under an Agency contract shall be available under Market Conditions to Participating States including Persons and Bodies under their Jurisdiction. However the Contractor may deny such access and use if contrary to his Legitimate Commercial Interests and in particular in the case of commercial interests identified as such in the contract. If an issue arises over the interpretation of a "Legitimate Commercial Interest," the Parties may seek a reasoned opinion from the Agency and/or another appropriate forum.

Without prejudice to the provisions under Chapter IV of the present Rules, and in accordance with the General Principles, the Contractor shall exploit the results obtained during the performance of an Agency contract.

- d. Access and use for scientific research purposes

Notwithstanding the provisions under (a)(b) and (c) above Member States, including their academic and scientific research institutions, shall have access to Information and Data and use of Intellectual Property free of charge for their own scientific research purposes, excluding commercial exploitation.

However the Contractor may deny such access and use if contrary to his Legitimate Commercial Interests and in particular in the case of commercial interests identified as such in the contract. If an issue arises over the interpretation of a "Legitimate Commercial Interest," the Parties may seek a reasoned opinion from the Agency and/or another appropriate forum.

## 2. PROTECTION OF INFORMATION, DATA AND INTELLECTUAL PROPERTY

- (a) In the case of Information and Data developed in the course of work performed under an Agency contract and which can be granted protection by any legal title

of Intellectual Property, the right to apply for and enjoy legal protection shall belong to the Contractor who has developed them.

- (b) At the Contractor's specific request and in order to allow him to file an application for any form of Intellectual Property right, the Agency shall defer Dissemination and Disclosure of the Information and Data for up to twelve months from the date on which they were communicated to it.

Except with the agreement of the Contractor, Information and Data related to an application for Intellectual Property shall not be disclosed by the Agency as long as the application has not been published in accordance with the relevant rules of applicable law or at least for a period of 18 months following the filing of the application.

However, the Agency shall have the immediate right to use this Information and Data free of charge for its Own Requirements in the field of space research and technology and their space applications, ensuring the non-Dissemination and non-Disclosure of the Information and Data.

- (c) If the Contractor does not wish to apply for any legal title of Intellectual Property, or wishes to abandon a legal title of Intellectual Property, he shall notify the Agency who may, after consulting him, investigate whether third parties would be interested in effectively protecting or exploiting the said innovation or invention. Failing to find such third parties and considering the importance of protecting the innovation or invention, the Agency may take the initiative to apply for such rights. The Contractor shall, in such cases, transfer his rights over the innovation to such third parties or to the Agency, as appropriate.

In the event of an Intellectual Property right secured by the Agency, as described above, the Contractor, the Agency, Member States and Participating States, as well as Persons and Bodies under their Jurisdiction, shall be entitled to a free of charge, non-exclusive, irrevocable licence to use the Intellectual Property for their own purposes, without the right to grant sub-licences.

- d) When the Contractor secures the right over any Information and Data under any legal Intellectual Property title, but does not effectively exploit it within a period of time specified in the contract, the Agency reserves the right to investigate, after consulting him, whether third parties would be interested in effectively exploiting the said technology. In such a case, the Contractor shall license this technology to such a third party or parties under Favourable Conditions.
- (e) The Contractor shall make available to the Agency for the specific purpose of Section II.1(a), the right of access to and use of the source code and related documentation in respect of a computer programme (i.e. software) developed under an Agency contract, ensuring appropriate security and confidentiality and only for special cases.

- (f) In the specific case of Operational Software, the Agency may request, at the stage of invitations to tender, the ownership of the Intellectual Property on conditions to be defined in the contract.

The Contractor shall, in this case, be entitled to a free of charge, non-exclusive, irrevocable licence to use the innovation for his own purposes, without the right to grant sub-licences.

### 3. BACKGROUND INFORMATION, DATA AND INTELLECTUAL PROPERTY

If the Contractor intends to use in the execution of a contract Information, Data or Intellectual Property which does not result from that contract, he may first identify it to the Agency.

If such Information, Data or Intellectual Property results from another Agency contract, its re-use shall not change the rights of ownership or access which derive from that contract. If it does not result from any Agency contract, it shall be treated as background Information, Data or Intellectual Property, as set out hereafter.

The rights which the Contractor possesses to background Information, Data or Intellectual Property, whether as owner, licensee or in any other capacity, shall not be affected in any way by his use of them in the execution of an Agency contract, except with his written agreement. The Agency shall not disseminate such Information, Data or Intellectual Property without the Contractor's written agreement and shall ensure its protection to the Contractor's satisfaction.

When the Contractor intends to use Information, Data and Intellectual Property owned by a third party as background Information, Data or Intellectual Property, the Contractor shall ensure that rights of access are granted for the Agency to use it as appropriate and that the Agency is protected from any claim by third party.

The Contractor shall use reasonable efforts to ensure the availability of background Information, Data and Intellectual Property to any other Contractors in the same project to the extent required to achieve the purposes of the project. In the event that the performance of the project requires the other Contractor to grant a sub-licence, such a sub-licence shall be granted exclusively for the purposes of the project and only after prior consultation with the Contractor.

### 4. RIGHT OF REPRODUCTION

- (a) The Agency is entitled to have a product or a design or any part thereof, originally developed under contract to the Agency, re-manufactured, i.e. reproduced, either by the Agency itself or by another Contractor, provided that such reproduction is made for the Agency's Own Requirements in the field of space research and technology and their space applications and subject to reimbursement of any costs incurred by the original Contractor.

The original Contractor shall be offered the work in priority over any other potential Contractors if he is able and willing to undertake the work at a fair and reasonable price and to make delivery as required by the Agency. If the Agency then opens the work to competitive tendering the original Contractor shall be preferred if he proposes to the Agency conditions, including price and delivery terms, at least equal to those of his competitors.

In the event of reproduction being contracted to another Contractor, the original Contractor shall grant the necessary licences to the other Contractor.

- (b) The original Contractor shall supply any additional documentation, and/or any technical assistance and know-how which the Agency might require for the exercise of the reproduction right, including for reverse engineering and recompilation of any essential source code software, in order to allow the manufacturing and reproduction of the item or design originally developed under the Agency contract. The original Contractor shall be reimbursed for any expenses associated with this supply.

In the event of third party rights, such as to background information, the Contractor shall use reasonable efforts to obtain at the Agency's expense any permissions or licences necessary for the exercise of the right of reproduction.

The Agency shall require the recipients of the Information, documentation and Intellectual Property rights as described above to use and communicate it only for the purpose of exercising the right of reproduction. The Agency and such recipients shall strictly protect the confidentiality of all such Information, documentation and Intellectual Property rights.

- (c) The right of reproduction shall be available to Participating States for purposes in the field of space research and technology and their space applications in accordance with the rights of access described in Section II.1(a) and (b) above. The Agency shall, in such event, act as intermediary between the Contractor and the Participating States or the Persons and Bodies under their Jurisdiction.

## 5. FEES

- (a) The Contractor may be required to pay a fee to the Agency if he sells articles developed under the contract or if he licenses or assigns rights in any Information, Data or Intellectual Property developed under the contract within ten years after the date of final acceptance of the work performed under the contract. The criteria for applying, calculating, reducing and exceptionally waiving such a fee shall be made public by the Agency.
- (b) The Agency shall specify in the invitation to tender whether a fee will be applicable and, if so, shall also specify how the amount of this fee will be calculated.
- (c) The obligation to pay a fee shall not arise where the articles, licences or rights

are sold for purposes in the field of space research and technology and their space applications in the Participating States as specified in Section II.1(a) (b) and (d).

- (d) The rates to be applied shall, in principle, be based on the value of the transaction and shall take due account of all relevant circumstances. The total amount of the fee paid shall not, however, exceed the total of the research and development cost paid by the Agency under the contract.

## 6. EVALUATION OF TECHNOLOGY

The Contractor shall assist the Agency in assessing and evaluating the Information, Data and Intellectual Property which have led to products or designs, with a view to their use or re-use in new programmes, both public and commercial, and to promote their utilisation among the space and non space community.

## 7. REPORTS BY THE CONTRACTOR

Reports produced by Contractors in satisfaction of the requirements of the contract shall normally be published and shall be available to Participating States. The Contractor shall deliver to the Agency background Information and Data including confidential documents such as commercially sensitive information. However, this information shall not be incorporated in such reports and shall not be distributed outside the scope foreseen in the contract. ESA and the Contractor will endeavour to draft a document which both parties deem suitable for publication.

## 8. EXPLOITATION REPORTS

In order to give practical effect to Section II.2(d) above, the Contractor shall provide the Agency with a report regarding the exploitation results of the contract. Updates of the said report shall be provided if required.

# SECTION III

## ACTIVITIES NOT FULLY-PAID BY THE AGENCY

Unless otherwise agreed by the Participating States, the following provisions shall apply to activities not fully paid by the Agency.

### 1. ACCESS TO INFORMATION, DATA AND USE OF INTELLECTUAL PROPERTY

- a. Access and use to be reserved by the Agency

For the Agency's Own Requirements in the field of space research and technology and their space applications, Information, Data and Intellectual

Property resulting from work performed under an Agency contract shall be available:

- to the Agency free of charge;
- to Participating States, including Persons and Bodies under their Jurisdiction on conditions reflecting the Contractor's financial participation.

b. Other access and use

Except as provided under Section III.1.(a), access to Information, Data and use of Intellectual Property resulting from work performed under an Agency contract shall be available under Market Conditions. However, the Contractor may deny such access or use if contrary to his Legitimate Commercial Interests and in particular in the case of commercial interests identified as such in the contract. If an issue arises over the interpretation of a "Legitimate Commercial Interest," the Parties may seek a reasoned opinion from the Agency and/or another appropriate forum.

Without prejudice to the provisions under Chapter IV of the present Rules, and in accordance with the general principles stated in Section I above, the Contractor shall exploit the results obtained during the performance of an Agency contract.

2. PROTECTION OF INFORMATION, DATA AND INTELLECTUAL PROPERTY

- (a) In the case of Information and Data developed in the course of work performed under an Agency contract and which can be granted protection by any legal title of Intellectual Property, the right to apply for and enjoy legal protection shall belong to the Contractor who has developed them.
- (b) At the Contractor's specific request and in order to allow him to file an application for any form of Intellectual Property right, the Agency shall defer Dissemination and Disclosure of the Information and Data for up to twelve months from the date on which they were communicated to it.

Except with the agreement of the Contractor, Information and Data related to an application for Intellectual Property shall not be disclosed by the Agency as long as the application has not been published in accordance with the relevant rules of applicable law or at least for a period of 18 months following the filing of the application.

However, the Agency shall have the immediate right to use this Information and Data free of charge for its own requirements in the field of space research and technology and their space applications, ensuring the non-Dissemination and non-Disclosure of the Information and Data.

- (c) When the Contractor secures rights over any Information and Data under any legal Intellectual Property title but does not effectively exploit it within a period of time specified in the contract, the Agency reserves the right to investigate,

after consulting the Contractor, whether third parties would be interested in effectively exploiting the said Information and Data. In such a case, the Contractor shall license the Intellectual Property Right to such a third party or parties under Favourable Conditions.

- (d) The Contractor shall make available to the Agency for the specific purpose of Section III.1(a), the right of access to and use of the source code and related documentation in respect of a computer programme (i.e. software) developed under an Agency contract, ensuring appropriate security and confidentiality and only for exceptional cases.

### 3. BACKGROUND INFORMATION, DATA AND INTELLECTUAL PROPERTY

If the Contractor intends to use in the execution of a contract Information, Data or Intellectual Property which does not result from that contract, he may first identify it to the Agency. If such Information, Data or Intellectual Property results from another Agency contract, its re-use shall not change the rights of ownership or access which derive from that contract. If it does not result from any Agency contract, it shall be treated as background Information, Data or Intellectual Property, as set out hereafter.

The rights which the Contractor possesses to background Information, Data or Intellectual Property, whether as owner, licensee or in any other capacity, shall not be affected in any way by his use of them in the execution of an Agency contract, except with his written agreement.

The Agency shall not disseminate such Information, Data or Intellectual Property without the Contractor's written agreement and shall ensure its protection to the Contractor's satisfaction.

When the Contractor intends to use Information, Data and Intellectual Property owned by a third party as background Information, Data or Intellectual Property, the Contractor shall ensure that rights of access are granted for the Agency as appropriate and that the Agency is protected from any claim by third party.

The Contractor shall grant a licence on Favourable Conditions for access background Information, Data and Intellectual Property by other Contractors in the same project to the extent required to achieve the purposes of the project. In the event that the performance of the project requires the other Contractor to grant a sub-licence, such a sub-licence shall be granted exclusively for the purposes of the project and only after prior consultation with the Contractor.

### 4. RIGHT OF REPRODUCTION

- (a) The Agency is entitled to have a product or a design or a part thereof, originally developed under contract to the Agency, re-manufactured, i.e. reproduced, either by the Agency itself or by another Contractor, provided that such



reproduction is made for the Agency's Own Requirements in the field of space research and technology and their space applications and subject to reimbursement of any costs incurred by the original Contractor.

The original Contractor shall be offered the work unless he is unable or unwilling to undertake the work at a fair and reasonable price or is unable to meet the delivery schedule required by the Agency.

In the event of reproduction being contracted to another Contractor, the original Contractor shall grant the necessary licences to the other Contractor.

- (b) The original Contractor shall supply any additional documentation, and/or any technical assistance and know-how which the Agency might require for the exercise of the right of reproduction, including for reverse engineering and recompilation of any essential source code software in order to allow the manufacturing and reproduction of the item or design originally developed under the Agency contract. The original contractor shall be reimbursed for any expenses associated with this supply.

In the event of third party rights, such as to background information the Contractor shall use reasonable efforts to obtain at the Agency's expenses any permissions or licences necessary for the exercise of the right of reproduction.

The Agency shall require the recipients of the Information, documentation and Intellectual Property rights as described above to use and communicate it only for the purpose of exercising the reproduction right. The Agency and such recipients shall strictly protect the confidentiality of all such Information, documentation and Intellectual Property rights.

## 5. FEES

The Contractor shall not be required to pay a fee to the Agency if he sells articles developed under the contract or if he licenses or assigns rights in any subject matter developed under a contract not fully paid by the Agency.

## 6. EVALUATION OF TECHNOLOGY

The Contractor shall assist the Agency in assessing and evaluating the Information, Data and Intellectual Property which have led to products or designs, with a view to their use or re-use in new programmes, both public and commercial, and to promote their utilisation among the space and non space community.

## 7. REPORTS BY THE CONTRACTOR

Summary reports produced by Contractors in satisfaction with the requirements of the contract shall normally be published and shall be available to Participating States. The Contractor shall deliver to the Agency background Information and Data including confidential documents such as commercially

sensitive information. However, this information shall not be incorporated in such reports and shall not be distributed outside the scope foreseen in the contract. ESA and the Contractor will endeavour to draft a document which both parties deem suitable for publication.

## 8. EXPLOITATION REPORTS

In order to give practical effect to Section III.2(c) above, the Contractor shall provide the Agency with a report regarding the exploitation results of the contract. Updates of the said report shall be provided if required.

## SECTION IV

### GENERAL PRINCIPLES CONCERNING PARTNERSHIP ACTIVITIES

With respect to the applicable Information, Data and Intellectual Property provisions in the context of activities carried out in partnership with third parties, the main principles described above in Sections II and III may be applicable to ownership, access and use by co-Contractors or partners and other third parties.

Since no two partnerships are likely to be identical, rules regarding Information, Data and Intellectual Property will have to be negotiated by the parties to the partnership on a case by case basis and be incorporated in the partnership agreement, having regard to:

- the nature and scope of the partnership;
- the type of participating entities;
- the interests of the parties involved and
- their financial participation.

## **CHAPTER III**

### **INFORMATION AND DATA RELATING TO PAYLOADS FLOWN IN THE FRAMEWORK OF AN AGENCY PROGRAMME**

Chapter III deals with Information, Data and Intellectual Property on raw, calibrated, analysed and other data resulting from payloads flown in the framework of an Agency programme including third parties' flight opportunities.

Section I lays down the general principles.

Section II deals with ownership, access, use and dissemination of raw and calibrated data resulting from a programme or activity of the Agency.

Section III deals with ownership, access, use and dissemination of Information, Data and Intellectual Property produced by the analysis of the raw and calibrated data resulting from a programme or activity of the Agency.

Finally, section IV deals with Information, Data and Intellectual Property relating to payloads or flight opportunities other than those in section II and III.

## **SECTION I**

### **GENERAL PRINCIPLES**

The following rules are applicable unless provided otherwise by the Council or Participating States in the relevant Agency programme, having regard to the nature and scope of the programme and the interests of the parties involved, taking into account Articles III.2 and III.4 of the ESA Convention relating to the Agency's obligation to ensure the widest availability of scientific results deriving from its activities, and also taking into account any applicable international regulation, whether originating from the Agency or other bodies of international law.

The present rules are applicable to Agency programmes which differ in their nature and scope, in the kind of data produced and in the kind of users of the said data. In particular we can distinguish three main situations: (1) a payload financed and flown in the framework of an Agency programme or activity; (2) a payload financed by a Provider and flown on an Agency flight opportunity; (3) other cases.

In situation (1) and (2) the Agency shall define the access policy to the data in accordance with the principles described under sections II and III. In addition, in situation (2), the rights and obligations of the Agency and the Provider shall be laid down in a contract or other suitable form of agreement.

In both cases, it is understood that when the flight opportunity is offered on a space vehicle not belonging to the Agency, the Agency shall make its best efforts to negotiate conditions reflecting the principles set forth below.

In situation (3), section IV applies.

## **SECTION II**

### **OWNERSHIP, ACCESS, USE AND DISSEMINATION OF RAW AND CALIBRATED DATA RESULTING FROM A PROGRAMME OR ACTIVITY OF THE AGENCY**

#### **1. OWNERSHIP OF RAW AND CALIBRATED DATA**

The Agency shall be the owner of all raw and calibrated data directly resulting from a payload flown in the context of an Agency's programme or activity (excluding any data which are required for the control of the payload itself) including when the payload is furnished by a Provider.

#### **2. INFORMATION NECESSARY FOR THE OPERATION OF A PAYLOAD OR FOR THE SUBSEQUENT ANALYSIS OF ITS PERFORMANCE**

In the framework of an Agency programme, the Agency shall be responsible for the Launch and in-flight operation of the payload.

When a Provider furnishes the payload, the Provider shall provide the Agency with all information which is necessary for the launch and in-flight operation of the payload. Any proprietary information so provided shall be kept confidential and shall not be used for any other purposes. The information shall not be communicated to third parties without the prior written agreement of the Provider. Such agreement shall, however, not be withheld if, in the opinion of the Agency, the communication is required for the proper operation of the payload, for the utilisation of the payload data or for reasons of safety.

The Agency shall, under similar conditions of confidentiality, provide the Provider with such information on the in-flight performance and operational conditions of the space vehicle as is necessary for the Provider to evaluate the performance of the payload.

#### **3. ACCESS, USE AND DISSEMINATION OF RAW AND CALIBRATED DATA**

- (a) The Agency shall be entitled to use the raw and calibrated data resulting from the payload for its own purposes in the field of space research and technology and their space applications and shall be entitled to protect it through any form of Intellectual Property. In the event of an Intellectual Property title obtained by the Agency, Participating States and Persons and Bodies under their Jurisdiction shall be entitled to free-of-charge, non-exclusive access and use.
- (b) The Agency may grant the Provider an exclusive right of prior access to the said data. The duration of the right of prior access shall be agreed between the Agency and the Provider concerned and shall be approved by the relevant delegate body. The duration shall depend on, inter alia:

- the extent and nature of the involvement of the Provider in the development of the payload;
- the type and complexity of the data to be received from the payload.

The conditions on which third parties may be given access to raw and calibrated data resulting from the in-flight operation of the payload shall be determined by the Participating States in the programme concerned, taking into account any views expressed by the Provider. Unless there are specific reasons of commercial interest, acceptable to the Participating States, such conditions should normally provide for unrestricted access by third parties.

### **SECTION III**

#### **OWNERSHIP ACCESS, USE AND DISSEMINATION OF INFORMATION, DATA AND INTELLECTUAL PROPERTY PRODUCED BY THE ANALYSIS OF DATA RESULTING FROM AN AGENCY PROGRAMME OR ACTIVITY**

##### **OWNERSHIP, ACCESS, USE AND DISSEMINATION OF ANALYSED DATA**

- (a) In the framework of an Agency programme, any Information, Data and Intellectual Property produced by the Agency based on and after analysis of the data resulting from the payload shall be the property of the Agency.

The access, use and dissemination of the data shall be decided by the Participating States to the programme concerned within a clear and coherent policy.

The commercial use of the data delivered by the payload may be allocated by the Agency to third parties, on conditions to be approved by the Participating States to the programme concerned. Such conditions shall take account of any investment made or to be made by a third party and shall afford the necessary protection to any Intellectual Property created by the third party at its own expense.

- (b) When the payload is furnished by a Provider, any Information, Data and Intellectual Property produced by a Provider based on, and after analysis of, the data resulting from the in-flight operation of the payload, shall be the property of the Provider subject to the following provisions:

- (i) The Provider shall inform the Agency of any application for an Intellectual Property title within two months of the filing.

The Agency shall treat such information as confidential as long as the application has not been published in accordance with the relevant law or at least for a period of 18 months following this application.

- (ii) The Agency shall have the immediate right to use this Information and Data free of charge for its own requirements in the field of space research and technology and their space applications, ensuring the non-Dissemination and non-Disclosure of the Information and Data.

- (iii) The Provider shall undertake to furnish the Agency with an analysis of the results obtained and shall take all reasonable steps to publish these or, alternatively, shall authorise the Agency to do so. Such publication shall include a suitable acknowledgement of the services afforded by the Agency. The Provider shall provide the Agency free of charge with an agreed number of copies of his publication. Notwithstanding the provisions in paragraph 2(b)(i) above, the Agency shall have the right to reproduce and disseminate results which have already been published.

## **SECTION IV**

### **INFORMATION, DATA AND INTELLECTUAL PROPERTY RELATING TO PAYLOADS OR FLIGHT OPPORTUNITIES OTHER THAN THOSE IN SECTION II AND III ABOVE**

With respect to the applicable provisions for ownership, access, use and Dissemination of Data resulting from a payload in circumstances other than those of Sections II and III above, the principles described above in Section II and III may be applicable.

However, since the above situations are likely not to be identical, rules regarding Information, Data and Intellectual Property will have to be agreed between the Agency and other parties and incorporated in an agreement, having regard to:

- the Agency's and other party or parties' interest in the flight of the payload;
- the technical, scientific and/or economic interest;
- the financial participation of the parties.

## **CHAPTER IV**

### **TRANSFER OUTSIDE THE MEMBER STATES OF TECHNOLOGY AND PRODUCTS**

#### **1. GENERAL PRINCIPLES**

The following provisions implement Article XI.5(j) of the ESA Convention, regarding the transfer outside the territories of the Member States of Technology and Products developed under the activities of the Agency or with its help. Bearing in mind the provisions of Chapters II and III of these Rules, particularly with respect to ownership of Information, Data and Intellectual Property and the general principle in favour of maximum exploitation of ownership rights, a distinction is drawn between Technology and Products which are owned by the Agency and those which are owned by Contractors.

This Chapter is without prejudice to the fact that export control lies with the national laws and regulations of the Member States and those international agreements to which Member States are bound.

These provisions are intended to ensure close liaison between the Agency and national export control authorities of the Member States.

International Organisations are considered to be outside the territory of the Member States.

Attention should be given to the terms and conditions of any relevant Co-operation Agreement approved by the Council or those of any specific additional agreement.

#### **2. TECHNOLOGY TRANSFER BOARD**

The Council shall establish a Technology Transfer Board (hereinafter referred to as "TTB") to consider proposals for Transfers of Technology or Products outside the territories of the Member States. The Council shall adopt the Terms of Reference and Rules of Procedure for the TTB by a two-thirds majority of all Member States.

##### **a. Transfers by the Agency**

No such Transfer of Technology or Products which are owned by the Agency may take place without the authorisation of the TTB.

b. Transfers by Contractors

No such transfer of Technology or Products, which are owned by a Contractor, may take place without a recommendation of the TTB.

3. EXAMINATION BY THE TECHNOLOGY TRANSFER BOARD OF PROPOSALS TO TRANSFER TECHNOLOGY AND PRODUCTS

- (a) The Director General shall inform the TTB without delay of any proposal to transfer outside the territory of the Member States Technology or Products which are owned by the Agency.
- (b) Contractors shall inform the Agency without delay of any proposal to transfer outside the territory of the Member States Technology or Products which are owned by them and which resulted from Agency programmes or activities. The Agency shall immediately inform the TTB of such proposals.
- (c) The Director General and the members of the TTB shall treat all such information and any associated documentation in strict confidence, in accordance with Chapter V of these Rules. In particular, they shall be communicated only on a need-to-know basis and, except for communication from the Agency to the TTB, with the prior written approval of the originator.
- (d) In considering its authorisations and recommendations, the TTB shall take into account the following:
  - (i) the objectives of the Convention and, in particular, the exclusively peaceful purposes of the Agency;
  - (ii) the competitiveness of European industry and, in particular, in the case of Contractor proposals, that of the Contractor;
  - (iii) compliance with export controls in force in the Member States and, in particular, in the Member State under the jurisdiction of which the proposed transfer would be effected;
  - (iv) any reciprocity for the Agency and the Member States which may be appropriate;
  - (v) any requirements for restriction on re-export;
  - (vi) any relevant technology transfer agreements.
- (e) In the case of Contractor proposals, the Agency shall communicate the recommendation of the TTB to the Contractor without delay.
- (f) The TTB shall make appropriate arrangements to ensure that its recommendations are communicated to the relevant export control authority.



## **CHAPTER V**

### **PROTECTION COVERING INFORMATION, DATA AND INTELLECTUAL PROPERTY HELD BY THE AGENCY**

#### **1. GENERAL PRINCIPLES**

- (a) With due regard to the provisions contained in previous chapters of these Rules, including those which are designed to ensure the widest dissemination of Information, Data and Intellectual Property, the Director General of the Agency shall take all appropriate measures to prevent unlawful appropriation or unauthorised disclosure of Information, Data and Intellectual Property obtained in the course of the activities and programmes of the Agency.

In particular, any document containing information of a private or highly sensitive nature in relation to the carrying out of a programme, to the Agency's international relations or to a private entity's interests shall be regarded as confidential and protected accordingly.

As necessary, the Agency shall conclude arrangements on the protection of information with Member States, non-Member States, Persons or Bodies under their Jurisdiction or international organisations.

- (b) Moreover, the Director General shall, as required by the international agreements or contracts concluded by the Agency, ensure that Information, Data and Intellectual Property owned by a third party and provided by the latter to the Agency for the purpose of carrying out its activities and programme shall receive a level of protection equivalent to that which it received from the third party providing it.

#### **2. RULES AND REGULATIONS**

- (a) The Director General shall ensure and define rules and regulations for the respect of any Intellectual Property right owned by the Agency or by any other natural or legal person in compliance with national and international rules of law in order to prevent any unauthorised use, which includes, but is not limited to, manufacturing, selling, publication, modification, transmission, reproduction, distribution, performance, display or exploitation in whole or in part.
- (b) The Director General shall define rules and regulations laying down the basic principles and minimum security standards for safeguarding Information and Data held by the Agency from loss of confidentiality, availability or integrity. Information and Data held by the Agency shall be safeguarded by a balanced set of security procedures, including personnel, physical and information security, which shall extend to all individuals having access to Information

and Data, to information carrying media or to premises containing such Information, Data or media.

- (c) The Director General shall not communicate protected information received from one Member State to another Member State or a Person or Body under its Jurisdiction without the prior written consent of the originator of the information.
- (d) To ensure access by the Agency, for its own requirements in the field of space research and technology and their applications or for the purpose of the Agency's own security, to classified information, the unauthorised disclosure of which could damage the security interests of the Agency or those of one or more Member States, the Agency shall conclude a security agreement with its Member States and the Director General shall, with the assistance of national Experts, develop specific provisions for the standard protection of such information. The Council shall adopt these provisions by unanimous vote.

## ANNEX I

### DEFINITIONS

- **“Activity not Fully- Paid by the Agency”** refers to an activity paid in part by the Agency in principle up to 50% and for the rest by the Contractor(s) and/or other private sector sources, unless otherwise agreed by Participating States;
- **“Agency's Own Requirements”** refers to activities and programmes undertaken by the Agency according to Article V.1 (a) and V.1 (b) of the Convention;
- **“Contractor”** refers to a legal person or body who is party to a contract to supply goods or services to the Agency whether as prime or single Contractor or as a sub-Contractor.
- **“Dissemination and Disclosure”** refers to the disclosure of Information and Data by any means other than by publication in the course of the formalities for protecting the Information and Data;
- **“Expert”** refers to an individual who, acting in a personal capacity in view of his specialised knowledge, experience and qualifications, advises the Agency or performs on its behalf a particular task for which internal expertise does not exist or cannot be deployed;
- **“Fellow”** refers to a person appointed to perform individual research or to participate in a research project within ESA;
- **“Favourable Conditions”** refers to a price which is not established through the normal mechanism of supply and demand: it is lower than Market Conditions;
- **“Information and Data”** mean knowledge which is not or cannot be protected by a legal title of IPR. It may take forms of technical data and technical assistance such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals, instructions, skills, training, working knowledge or consulting services, whether written or recorded on other media or devices such as disk, tape or read-only memories. This knowledge may belong to a legal person or body and may be protected by trade secret and know-how;
- **“Intellectual Property”** refers to legal rights, which result from the intellectual activity in industrial, scientific, literary and artistic fields. The main titles in Intellectual Property are patents, copyrights, trademarks, topography of semiconductor products, utility models and industrial designs as well as trade secrets and know-how;
- **“Legitimate Commercial Interest”** refers to a commercial interest of a Contractor that can be objectively demonstrated by him. A legitimate interest can be, but is not limited to, an economic position vis-à-vis competitors, profits, survival of the undertaking, etc.;
- **“Market Conditions”** refers to the price which a buyer is willing to pay and which a seller is willing to receive for a specific product or service;
- **“Member States”** refers to a State which is Party to the Convention of the European Space Agency in accordance with Articles XX and XXII of the said Convention.
- **“Operational Software”** refers to software deployed on the ground to validate and control a space mission or for calibration of data derived from a space mission and which has one or both of the following characteristics: (1) development, modification, enhancement and maintenance which is, or is

- expected to be, undertaken by several Contractors, e.g. under Frame Contracts;  
(2) expected use for essential purposes over a period of more than 5 years;
- **“Participating State”** refers to a Member or non-Member State participating in a given ESA Programme, according to Article V.1.a and b. of the ESA Convention;
  - **“Persons and Bodies under their Jurisdiction”** refers to any legal person or body under the jurisdiction of a Participating State;
  - **“Provider”** refers to any scientific or industrial entity providing a payload in the framework of an Agency programme or activity.
  - **“Staff Member”** refers to a person appointed pursuant to Article XII.3 of the ESA Convention and whose terms of employment are governed by the Staff Regulations, Rules and Instructions;
  - **“Technology and Products”** means specific information necessary for the development, production or use of a product or a process, whether protected by a legal title of Intellectual Property or not. The information may take the form of technical data or technical assistance.